IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-299

GENE HENDERSON, doing business as Henderson Plumbing & Heating Company,
Petitioner,

vs.

PLUMBERS LOCAL No. 8 OF THE AMERICAN FEDERATION OF LABOR, an unincorporated labor organization, et al.,
Respondents.

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Respondents have undertaken to re-frame petitioner's statement of the questions presented by this petition for certiorari, and to re-state the facts. In so doing, Respondents have wholly ignored the record, in at least two particulars. In order that the Court may have the actual record, petitioner, pursuant to Rule 21 of the Rules of this Court, is requesting the clerk of the Supreme Court of Missouri to certify and transmit to this Court, at this time, the pertinent parts of the record on the matters involved.

Repeatedly, Respondents charge that petitioner maintains "substandard wages and working conditions". They

notified petitioner by letter (Exhibit 16, Orig. Rec. 2nd Tr. 68) that they had been advised that petitioner was "not paying your employees the *wages*" which they claim they have established in the area.

The fact is that petitioner paid (as his District 50 contract provided) $4.39 per hour as against $4.20 per hour paid under Plumbers Local No. 8 contracts, and as against the same rate of $4.20 as determined by the Missouri Industrial Commission to be the prevailing rate. (Orig. Rec. 1st Tr. 81-83) (See also, Plff's Ex. 1, the union contract between petitioner and District 50, and p. 17 thereof; Plff's Ex. 2 and Plff's Ex. 4; testimony at pp. 15 to 18 Orig. Rec. 1st Tr.; testimony Orig. Rec. 2nd Tr. pp. 48 to 51; and testimony Orig. Rec. 2nd Tr. 65.)

It thus appears that the wages paid by petitioner were *higher* than those paid to defendant Local No. 8's members and higher than the prevailing wages established by the Industrial Commission. While there were some differences with respect to the so-called "fringe benefits", the District 50 contract was negotiated on the theory that its members preferred greater take home pay, and the right to provide, out of that greater pay, their own welfare plans.

Related to the failure of Respondents to stay within the record on the issue of "substandard" wages, is Respondents' departure from the record by misquoting the District 50 contract in the footnote appearing at page 3 of Respondents' brief. Respondent has added, in two places, the clause "and/or fringe benefits;" but the contract itself *contains no such phrase.* Even the reference citation to the contract provision as appearing in Article V, Section 3 of Exhibit No. 1 is wrong. Article V relates only to Management Rights. Article IX relates to wages; and Section 2 thereof (page 9 of Exhibit 1) merely provides that the employer shall conform to *wage increases* in the indus-

try made after the contract was drawn, by paying such increased wages after letter notice from the Union (meaning, of course, District 50). That original contract will be among the parts of the record to be transmitted to the Court by the clerk of the court below under Rule 21. And the paragraph in question is set out in the footnote below.[1]

Finally, on the point here involved, Respondents again depart from the record in the statement at page 4 of their brief that "Although Petitioner repeatedly asserts in his brief that his employees received greater take home pay he ignores entirely the contrary evidence by his employees." The reference to "his employees" is to the testimony of two disgruntled ex-employees Ted Grigsby (Orig. Rec. 2nd Tr. pp. 71 to 78), and Duke Woods. (Orig. Rec. 2nd Tr. pp. 78 to 84)

There is *not a word of testimony* from either of these ex-employees *as to take home pay.* Their testimony was in answer to leading questions as to fringe benefits, and the false claim that they did not receive overtime pay. Their testimony is discredited by the fact that they never made any complaint, either to petitioner, or to their union, with

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1. Section 2 of Article IX of the District 50 contract reads as follows: "In the event a wage increase is granted or given during the period of this Agreement to the organized workers in the Greater Kansas City area engaged in the crafts, trades or classifications listed in Appendix "A" of this Agreement, then such wage shall be given and granted by the Employer to the Employees covered under this Agreement thirty (30) days after the effective date of such increase or the date of notice by letter to the Council from the Union, whichever is later; however, in no event shall such increase result in the Employer's paying the Employees covered by this Agreement any amount in excess of the amount paid to the workers in the Greater Kansas City Area engaged in the crafts, trades or classifications listed in Appendix "A" of this Agreement."

respect to non-payment of overtime, or anything else; that they never invoked the grievance proceedings provided for by their union contract; that they never complained to anybody at all (Orig. Rec. 2nd Tr. 84); and finally, that *they kept their own time records!* (Orig. Rec. 2nd Tr. 86).

Respondents' use of the word "accepted" in referring to the charge presented to the Regional Director of the NLRB before this suit was filed is both inaccurate and misleading. Respondent would make it appear that the Director "accepted" the charge; that is, that he *assumed jurisdiction* over it. Actually, as shown by the Regional Director's letter of October 31, 1963, which was originally offered in evidence in connection with depositions and there marked as Deft's Ex. 2, and is later incorporated in the final record as Defendant's Exhibit 2 (Orig. Rec. 2nd Tr. 45) states that because there is insufficient evidence that the charged party's picketing was for an object proscribed by Section 8(b)(7) of the Act, "I am therefore refusing to issue a complaint in this matter." In other words, the Regional Director by refusing to issue a complaint, in effect, refused to take jurisdiction. It is, however, wholly beside the point to say that the Regional Director undertook to assume jurisdiction, because, as has been shown (Pet. for Cert. 16, et seq.) unless the facts upon which its jurisdiction must rest actually exist, and the Board's findings thereof disclose their existence, no action on the part of the Regional Director, or even on the part of the petitioner, could confer jurisdiction where none, in fact, exists.

In this connection, it will be noted that Respondents' brief makes no attempt to answer the point here involved, which is fully covered in the Petition for Certiorari (pp. 16 to 19), but entirely ignored in Respondents' brief.

Respondents have also entirely ignored the fact that, in this case, there was no legitimate labor dispute; hence no jurisdiction in the NLRB. That tribunal is one of limited jurisdiction, empowered by the Act of Congress to deal with matters of controversy with respect to labor disputes affecting interstate commerce. In dealing with that issue we have already pointed out that, in order to create jurisdiction in the NLRB there must not only be an adverse effect in interstate commerce, but the matter must also deal with a legitimate labor dispute.

In all of the cases relied upon by Respondents, the fact that a labor dispute was involved abundantly appears. That was true in Garner, Weber, Garmon, and also in Ariadne.[2] In all of those cases, the existence of a labor dispute was shown to exist; hence, as was said in Garmon and in Ariadne, it was "arguably" present; and, as was said in Garner and in Weber it was "reasonably" present. There is no difference, in principle, between what is "arguable" and what is "reasonable".

With respect to Ariadne, there can be no question but that a labor dispute was involved. There, the Union was attempting to force union status on the longshoremen; who, obviously, were not already under union contract with any other union. It was, therefore, a legitimate union objective to bring such workmen into the fold of organized labor.

That is a far cry from the situation existing in the case at bar. Here, petitioner's workmen were already well represented by a duly accredited labor union, recognized by the NLRB as the exclusive bargaining agent. Here, the claim that their wages and working conditions were

2. *Garner* v. *Teamsters Union*, 346 U.S. 485; *Weber* v. *Anheuser-Busch, Inc.*, 348 U.S. 468; *Building Trades* v. *Garmon*, 359 U.S. 236; *ILA Local 1264* v. *Ariadne Shipping Co.*, 397 U.S. 195.

"substandard", is wholly false. Here, the wages—the "standards" set for petitioner's employees—had been established by the labor union of which they were members. Here, the standards so set by their exclusive bargaining agent, brought them *higher* wages than they would have received if they had been members of defendant union. Here, the defendant union did not have the right to set "standards", because that right belonged to another union —a union duly recognized by the NLRB. Here, the petitioner was powerless to negotiate with the defendant union, because he was bound by a contract giving to the District Fifty union that exclusive right. Here, if Petitioner had acceded to defendant union's demands, he would have been guilty of an unfair labor practice. None of these conditions were present in Ariadne.

In short, the finding of the trial court, on undisputed evidence that the picketing was "unlawful and in violation of plaintiff's rights * * * and that all of such acts constituted a malicious interference with plaintiff's business" (Orig. Rec. 2nd Tr. 89) discloses that the *real purpose* of the picketing was *not* to establish a legitimate labor claim, but was intentional, arbitrary and malicious, and for the purpose of destroying Petitioner's business. A legitimate labor dispute is not cut from that kind of cloth. It was not, and should not be held to be, the intent of Congress in the enactment of the National Labor Relations Act, to provide a haven for the conduct of union organizations having no legitimate labor objective, and designed to destroy an employer's business; and thus deny such an employer access to a Court of general jurisdiction for the redress of wrongs intentionally, wilfully and maliciously committed, merely because the wrongdoer happens to be a labor organization.

We respectfully submit that the Petition for Certiorari should be granted.

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